HONG LEONG LEASING SDN BHD

v.

FLICK MJI SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[SUIT NO: C3 (1ST DEFENDANT)-23-4109-1986]
14 JANUARY 2003

CIVIL PROCEDURE: *Judgment - Judgment based on admission - Admission made in the course of trial - Rules of the High Court 1980, O. 27 r. 3*

The plaintiff's claim against the defendants was met with a counterclaim from the first defendant. By a judgment delivered in 1995 the court imposed full liability on the fourth defendant. The first defendant's counterclaim against the plaintiff however was not considered. In 1999 the first defendant applied under O. 27 r. 3 of the Rules of the High Court 1980 ('RHC') to enter judgment against the plaintiff based on an admission that the plaintiff had made in the course of the trial. That application was dismissed. Hence this appeal.

Held (dismissing the appeal):

[1] Order 27 of the RHC is a pre-trial procedure or mode designed by the Rules Committee to enable a party to obtain immediate judgment prior to full trial grounded upon an admission in the pleadings or affidavits or pursuant to a notice under r. 2 of the same order. The sworn oral testimony given by the plaintiff during the course of the trial is therefore not amenable to invocation of the O. 27 procedure to resolve the first defendant's counterclaim. (p 197 e)

[2] In any event, the first defendant's failure to appeal against the 1995 judgment and their inertia makes the court wary of exercising any discretion under O. 27 of the RHC. (p 197 f)

Case(s) referred to:
Prestasia Sdn Bhd v. Mow Wai Lan [1997] 2 MLJ 236; [1995] 1 LNS 328 ***(refd)***
Thomson-Houston Co Ltd v. British Insulated and Helsby Cables Ltd [1924] All ER 446 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 27

For the appellant/first defendant - Lee Chin Peow; M/s Azman Davidson & Co
For the respondent/plaintiff - Ng Sai Yeang; M/s Raja Darryl & Loh

Reported by Mariette Peters-Goh

JUDGMENT

Vincent Ng J:

Preamble

This is an appeal by the 1st defendant against the decision of the learned Senior Assistant Registrar dated 8 March 2002, dismissing the 1st defendant's application to enter judgment against the plaintiff on the counterclaim pursuant to O. 27 r. 3 of the Rules of the High Court 1980 (the Rules).

Background

In order to adjudicate upon the 1st defendant's application, it was necessary to review the history of these proceedings.

The plaintiff's claim against the defendants was founded upon a factoring agreement whereby the 1st defendant sold off debts due from D4 amounting to RM677,603.68 to the plaintiff. **The 1st defendant denied the plaintiff's claim and counterclaimed a sum of RM203,281.11 against the plaintiff** as the outstanding purchase price of the debts sold. The 4th defendant took out third party proceedings, bringing a claim against the 1st defendant, who in turn made another counterclaim against the 4th defendant.

The case was heard over numerous dates, spanning a period of about 3 months from June to September 1994. Judgment was delivered on 4 May 1995 as follows:

(i) The 4th defendant is liable to meet the entire claim of the plaintiff and judgment is for the plaintiff for the entire sum claimed with costs;

(ii) plaintiff's claim against the 1st defendant & 2nd defendant is hereby dismissed with costs;

(iii) The 4th defendant's claim against 1st defendant is hereby dismissed with costs; and

(iv) The **1st defendant's counterclaim against the 4th defendant is hereby dismissed** with costs.

Despite having heard and recorded the whole evidence in the proceedings, the learned judge totally failed to consider 1st defendant's counterclaim against the plaintiff. This oversight is apparent from the opening paragraph of the grounds of judgment wherein the learned judge stated:

> This suit involves three parts. Firstly, the main claim by Hong Leong Leasing Sdn Bhd against the 4 defendants. Secondly by a third party proceedings is the claim by the 4th defendant against the 1st defendant and lastly is the **counterclaim by the** 1st defendant **against the 4th defendant** for damages.

It is common ground that this 4 May 1995 judgment left 1st defendant's counterclaim against the plaintiff unresolved.

When a similar situation occurred in *Prestasia Sdn Bhd v. Mow Wai Lan* [1997] 2 MLJ 236, Dato' Mahadev Shanker JCA had this to say:

> ... Since the order is totally silent as to the counterclaim, it followed that the trial judge did not make any order under ... 'that the counterclaim be struck out' which was what he was obliged to do if both parties had argued the merits of the matter and the judge considered it to be without merit. In the result, the counterclaim was left unresolved.

Surprisingly, not only did 1st defendant not appeal against the non-adjudication of their counterclaim, they did nothing further for nearly four years thereafter. As no explanation was forthcoming, this shall, like the Bermuda Triangle, remain a mystery. The application under O. 27 r. 3 of the Rules was only filed in February 1999.

The Admission

During the course of the trial, Fong Beet Hume (PW1), a manager of the collection division of the plaintiff testified as follows:

> ... If we succeed against defendant 4 we have to account to defendant 1 for 30%. At this point in time plaintiff are the owners of the invoices. The 30% is what the plaintiff actually owed defendant 1. I agree plaintiff cannot collect RM677,603.68 without paying 30% to defendant. Basis of claim against defendant 1 is that they owe us this amount since defendant 4 did not pay. (Exhibit WCS 2 Enclosure 165)

1st Defendant now seek to move this court, in a summary manner, pursuant to O. 27 r. 3, to enter judgment on their counterclaim based on this sworn testimony which they allege was an admission that the plaintiff did in fact owe 1st defendant RM203,281.11 (30% of RM677,603.68).

The Appeal

Order 27 r. 3 of the Rules provides as follows:

> Where **admissions of facts are made by a party to a cause or matter either by his own pleadings or otherwise**, any other party to the cause or matter may apply to the Court for such **judgment or order as upon those admissions** he may be entitled to, **without waiting for the determination of any other question between the parties**, and the Court may give judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons. (emphasis added)

The 1st defendant's submission that the words 'otherwise' in r. 3 aforementioned is not confined to only pre-trial admissions made under r. 1 of the same order is novel but clearly untenable as the words "without waiting for the determination of any other question between the parties" in r. 3 leaves one with no doubt that O. 27 r. 1 to 3 is solely intended by the Rules Committee to be a pre and not post trial provision in order to save costs and the court's time. Further, it stands to reason that the word 'admission' in O. 27 concerns admission made *vis-a-vis* parties to the proceedings rather than their respective witnesses.

In my opinion, O. 27 of the Rules is a pretrial procedure or mode designed by the Rules Committee to enable a party to obtain immediate judgment prior to full trial grounded upon an admission in the pleadings or affidavits or pursuant to a notice under r. 2 of the same order. For this reason, I hold that the sworn oral testimony given by PW1 during the course of a trial is not amenable to invocation of the O. 27 procedure to resolve the 1st defendant's counterclaim.

In any event, the 1st defendant's failure to appeal against the judgment dated 4 May 1995 and their inertia to assert their right to the 30% of the judgment awarded to the plaintiff (if indeed they have such a right) since the dismissal of the 4th defendant's appeal in 1998, makes me wary of exercising any discretion under O. 27 of the Rules – which discretion, I am entirely satisfied, is not available to me.

The Other Points Raised

The argument by the 1st defendant that as PW1 was giving evidence on the plaintiff's behalf, his evidence may be treated as an admission by the plaintiff, did not find favour with me for two reasons: Firstly, there is no indication in the extract of the notes of evidence (exh. 'LCK1') of the 2nd defendant's supporting affidavit affirmed on 12 February 1999 (encl. 163) that the witness concerned, namely Foong Beet Hume (PW1) was a director of the plaintiff

company; indeed it appears that he was a mere manager of the collection division. It is trite that a witness who gives evidence for a party in a proceeding does not constitute a party in any sense of the word – least of all, a party that is clothed with authority to make admissions against itself. Secondly, there is no evidence, either from the notes taken at the trial or otherwise, that PW1 had authority to make admissions against the plaintiff company. In my opinion, bereft of such authority, what evidence that is tendered at the trial is only given in proof of a state of mind of the witness who tenders it rather than as an admission by the party who proffers the witness. On this aspect of law, the decision in *British Thomson-Houston Co Ltd v. British Insulated and Helsby Cables, Ltd* [1924] All ER 446 is illuminating. The admissibility, in a subsequent suit, of the evidence of a witness used by a party in proof of any fact during trial, for the purpose of proof of such fact against that party in a subsequent suit was extensively expounded in British Thomson by the Court of Appeal, which held (by Sir Ernest Pollock, MR and Atkin LJ, with Sargant LJ dissenting – at p. 447 – B to D) that: "The evidence of a witness used by a party in proof of any fact during the trial of an action was not admissible in proof of such fact against that party in a subsequent suit in which he denies the fact; that position was not altered by the fact that the evidence was included in material put before the Court of Appeal or in the appendix to the case on an appeal to the House of Lords in the first action, for the evidence became part of the proceedings when it was first given and its presentation to an appellate tribunal did not stamp it with any fresh mark of adoption by the party who originally put it forward; and, therefore, the evidence was not admissible in the second action."

Conclusion

After having studied the application, affidavits and written submissions from both sides and based on the aforesaid reasons, I dismissed the 1st defendant's appeal with costs.